

SERVED: June 15, 1993

NTSB Order No. EA-3902

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of June, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-10673
)	
CARL F. HILKER, JR.)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the initial decision issued by Administrative Law Judge Joyce Capps at the conclusion of the evidentiary hearing on April 25, 1991.¹ The law judge reversed the order of the Administrator suspending respondent's Airline Transport Pilot Certificate for 30 days.

The order of suspension alleged in part:

¹Attached is an excerpt from the hearing transcript containing the oral initial decision.

2. On May 29, 1988, you acted as pilot-in-command of civil aircraft Number N79JH, a Raven Balloon Model S55A, in a balloon race held at Coney Island, Cincinnati, Ohio.
3. On the above-described flight, you operated the aforementioned balloon and passed within 75 feet of the control tower at an altitude of 60 feet AGL.
4. There was no emergency which necessitated that operation.
5. On the above-described flight, you operated the aforementioned aircraft carelessly endangering the lives and property of others.

Respondent was charged with violating 14 C.F.R. §§ 91.79(c) and 91.9.²

On appeal, the Administrator argues that the law judge erred in not affirming the charges. Respondent has filed a reply opposing the appeal.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest do not

²Section 91.79(c) [now recodified as § 91.119] provides:

§ 91.79 Minimum safe altitudes: General.

(c) *Over other than congested area.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle or structure.

For purposes of the balloon competition, the Administrator partially waived this paragraph to allow flight over open water or sparsely populated areas no closer than 200 feet to any person, vessel, vehicle, or structure.

Section 91.9 [now recodified as § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

require affirmation of the Administrator's order. We adopt as our own the findings of the law judge.

The disposition of this case pivoted on how close the balloon was to the control tower, specifically whether it was less than 200 feet from that structure. The law judge assessed the evidence and bluntly concluded:

Mr. Hilker is a very lucky fellow, I must say, because if the government didn't have such lousy eyewitnesses in the form of the people up in the control tower that day, I would have found him in violation. But they were incredibly bad witnesses, to where, I, in good conscience, could not accept any of their testimony. That has happened to me very rarely. I'm in my 18th year being on the bench now, and that has happened only two or three times in my entire judicial career that that has been the case.

It is true. I think both of them were trying their best, but they were trying to recollect what had happened three years ago and there were a lot of balloons out there, about 25 of them, and I think the balloon did get darn close to that tower, I think probably within the prohibited 200 feet. But what I think or surmise is unimportant. I have to base my decision on what the credible evidence is. And there is no credible evidence in this case that the Respondent operated his balloon within 200 feet of the tower structure.

There are certain pictures in the evidence that are Respondent's exhibits that come very close to convincing me of the 200 feet because they were taken from the balloon, but yet I'm not an expert on perceptual distances. I've had no testimony that I can rely on that would make me find that there was a violation here of 91.79(c), even though I feel in my gut he was within 200 feet. But as I say, I've got to base it on the credible evidence. That's why I say Mr. Hilker, you're a very lucky man because if they had come in, really, and you know, had a good recollection of what occurred that day, it would have been curtains. (Tr. 226-227).³

³We note that one of the controllers twice testified that the balloon was no more than 500-600 feet away when it passed the

Our plenary review of initial decisions is not de novo--we do not reweigh the testimony or second-guess the law judges' acceptance or rejection of testimony that they had the benefit of hearing firsthand. The Board has repeatedly stated that issues of witness credibility are the domain of the law judge and credibility findings will not be disturbed unless they are arbitrary or capricious, e.g., rest on the acceptance of inherently incredible testimony. See Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (served February 11, 1992), and cases cited therein. The Administrator's disagreement with the law judge's resolution of the credibility issues presented by the testimony in the record does not meet that standard.

(..continued)

control tower and later changed his testimony stating that the balloon was 100-150 feet from the tower. The controller in charge had difficulty remembering details of the episode and guessed that the balloon respondent operated was 75-100 feet from the tower cab. A photographer in the gondola guessed that the point of closest proximity to the tower was about 100-150 feet and noted that it is hard to judge distances. Respondent testified that he did not fly near the tower. As quoted above in the body of this decision, the law judge did not credit the testimony that the balloon was closer than 200 feet from the tower. Simply put, the law judge concluded that the Administrator did not carry his burden of proof, and the Administrator has not established error in the law judge's unwillingness to accept testimony she did not find credible.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.